



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 468 OF 2010

SO 1ST PLAINTIFF

JMO2ND PLAINTIFF

VERSUS

DR. NATHAN MURUGU1ST DEFENDANT

DR. LUCY MUCHIRI2ND DEFENDANT

DR. BESSIE BYAKIKA3RD DEFENDANT

DR. ANDREW KANYI 4TH DEFENDANT

THE NAIROBI HOSPITAL5TH DEFENDANT

AAR HEALTH SERVICES6TH DEFENDANT

MEDICAL PRACTITIONERS AND

DENTIST BOARD..... 7TH DEFENDANT

RULING

The plaintiffs' case was dismissed with costs to the defendants. Following that order, the 3rd and 5th defendants filed a bill of costs. The plaintiffs have moved the court to stay the taxation proceedings and stay of execution pending the determination of the appeal. The application is based on grounds set out on the face of the application and an affidavit sworn by the 1st plaintiff.

It is opposed and grounds of opposition have been filed on behalf of some of the defendants. The thrust of the application is that, if proceedings are allowed to continue the plaintiffs are likely to suffer irreparable loss as the appeal will be rendered nugatory.

On the other hand the defendants have submitted that the application does not meet the threshold of stay of execution. Counsel have filed written submissions and cited some authorities. I have considered the material before me. The bill of costs is yet to be taxed and therefore no order upon which a decree may be extracted has been made.

The plaintiffs have cited Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act in support of the application. They have already filed an appeal in this matter, this being Civil Appeal No. 252 of 2015 in the Court of Appeal.

The appeal is against the whole decision of this court which includes the dismissal order and costs awarded to the defendants. The plaintiffs have to satisfy the conditions set out under Order 42 Rule 6 aforesaid. I note however that counsel have not referred to Order 42 Rule 9 which has direct reference to Rules 6 and 7 whereby, for those rules to apply there must be an order made in execution of such a decree.

An order of costs is capable of execution only after taxation or determination of reference proceedings from a lower court. In the instant case, only an application has been filed. Taxation is yet to be conducted and it cannot be said that any order has been made in execution of such a decree. I am unable to go out of the provisions of Rule 9 aforesaid and can only observe that the plaintiff's application is premature.

No prejudice shall be occasioned by waiting until the said bill of costs is taxed because at that point, the plaintiffs will have the opportunity to apply for stay in the event the court of appeal will not have given any other orders. I must therefore find, as I hereby do, that the application lacks merit and is hereby dismissed. There will be no order as to costs.

Dated and delivered at Nairobi this 28th day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE